

A View from the Bench:

Apply the Golden Rule, But Don't Argue It

Colonel Grant C. Jaquith
Military Judge, U.S. Army Trial Judiciary

The Golden Rule Argument

Most of us were taught the Golden Rule as children: "Do to others as you would have them do to you."¹ As a precept promoting civility and professionalism in trial practice, the Golden Rule should be embraced by court-martial advocates.² In closing argument, however, the Golden Rule generally must rest unsaid.

The "Golden Rule argument" asks court-martial members to reach a verdict by imagining themselves as either the accused or the victim.³ The argument is based on the notion that members will be more lenient if they think of the result they would want if they were in the accused's place, but would convict more readily or impose a greater sentence if they stood in the shoes of the victim. Such arguments are "improper and impermissible in the military justice system,"⁴ and cannot be made to members or military judges.⁵

Rule for Court-Martial 919

Rule for Courts-Martial (RCM) 919 sets the bounds for closing argument on findings on the merits.⁶ Counsel may make "reasonable comment on the evidence in the case, including inferences to be drawn therefrom."⁷ Counsel may address the "testimony, conduct, motives, interests, and biases of witnesses to the extent supported by the evidence," and "may treat the testimony of witnesses as conclusively establishing the facts related by the witnesses."⁸ Expressions of personal opinion,⁹

¹ Luke 6:31 (New Revised Standard 1989); see also Matthew 7:12 ("In everything do to others as you would have them do to you; for this is the law and the prophets."). Some variation of the Golden Rule is part of most religions. See HUSTON SMITH, THE RELIGIONS OF MAN 351 (Perennial Library 1965) (1958); Susan Ryder, *Bound Together by the Golden Rule* (2005), <http://ezinearticles.com/?Bound-Together-by-the-Golden-Rule&id=116042>.

² "Refraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants." U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS R. 3.5 cmt. (1 May 1992) [hereinafter AR 27-26]. Our system of justice depends on fair competition in the parties' efforts to marshal the evidence for fact-finders. *Id.* R. 3.4 cmt. Reciprocal obligations sometimes are imposed, as in discovery. *Id.*; see also MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 701 (2008) [hereinafter MCM].

³ See BLACK'S LAW DICTIONARY 700 (7th ed. 1999).

⁴ United States v. Baer, 53 M.J. 235, 238 (2000). Golden Rule arguments are "universally condemned." United States v. Palma, 473 F.3d 899, 902 (8th Cir. 2007) (quoting Lovett *ex rel.* Lovett v. Union Pac. R.R. Co., 201 F.3d 1074, 1083 (8th Cir. 2000)). See generally Kevin W. Brown, Annotation, *Propriety and Prejudicial Effect of Attorney's "Golden Rule" Argument to Jury in Federal Civil Case*, 68 A.L.R. FED. 333 (1984). Golden rule arguments have been characterized as errors of intermediate seriousness, sometimes warranting reversal. J. Alexander Tanford, *Closing Argument Procedure*, 10 AM. J. TRIAL ADVOC. 47, 93-94 (1986).

⁵ See United States v. Nellums, 21 M.J. 700, 701 (A.C.M.R. 1985) (sentencing argument asking the military judge whether he would like the accused to walk the streets in his community or neighborhood held improper). Counsel addressing arguments to a military judge are not relieved of the obligation to conduct themselves "with the same high standards as [they] would before court members, notwithstanding the presumption that a military judge exercises discretion in distinguishing between proper and improper argument." *Id.*

⁶ MCM, *supra* note 2, R.C.M. 919.

⁷ *Id.* R.C.M. 919(b).

⁸ *Id.* R.C.M. 919(b) discussion.

⁹ United States v. Horn, 9 M.J. 429, 430 (C.M.A. 1980); United States v. Knickerbocker, 2 M.J. 128, 129-30 (C.M.A. 1977); United States v. Tanksley, 7 M.J. 573, 577 (A.C.M.R. 1979), *aff'd*, 10 M.J. 180 (C.M.A. 1980); see United States v. Zehrbach, 47 F.3d 1252, 1265-66, 1265 n.11 (3rd Cir. 1995) ("Although counsel may state his views of what the evidence shows and the inferences and conclusions that the evidence supports, it is clearly improper to introduce information based upon personal belief or knowledge."). Prefacing assertions with "the Government contends" or "the Government submits" is preferable to "I think" or other uses of the personal pronoun "I." *Tanksley*, 7 M.J. at 579; cf. United States v. Freisinger, 937 F.2d 383, 385-87 (8th Cir. 1991) (noting that the use of the personal pronoun "I" is not necessarily improper, but conveying a personal belief as to a witness's credibility is, and no less so when the preface is "I suggest that" or "I submit that."). It is acceptable to argue "'you are free to conclude,' 'you may perceive that,' 'it is submitted that,' or 'a conclusion on your part may be drawn.'" United States v. Fletcher, 62 M.J. 175, 180 (2005) (quoting United States v. Washington, 263 F. Supp.

vouching for the credibility of witnesses,¹⁰ comments calculated to inflame passions or prejudices,¹¹ and statements not supported by evidence¹² are among the arguments not permitted.¹³ These rules for closing argument apply equally to defense and trial counsel.¹⁴ Though RCM 1001(g),¹⁵ which governs sentencing arguments, does not repeat or refer to the standards spelled out in the discussion of RCM 919(b), that discussion sets forth general principles that may be applied to sentencing arguments.¹⁶

Pursuit of a Perspective of Personal Interest

Golden Rule arguments are impermissible because urging court members to put themselves in the place of a victim, a near relative of a victim, or a potential victim, invites the members “to cast aside the objective impartiality demanded of [members] and judge the issue from the perspective of personal interest.”¹⁷ If a court member had such an interest in the case, the member would be disqualified.¹⁸ Asking members to picture themselves or their families as crime victims, and thus to feel personal interest in the case, is also foreclosed as “calculated to inflame the passions or prejudices” of the members.¹⁹

2d 413, 431 (D. Conn. 2003)). The most appropriate and persuasive preface is “the evidence shows,” without characterizing the contention as a personal opinion or belief. Cf. *Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 269 (5th Cir. 1994) (“remarks of counsel should more appropriately have been phrased ‘the evidence shows’ rather than ‘I believe’”); *United States v. Thiederman*, Nos. 91-30308, 30324, and 30327, 972 F.2d 1347, tbl. (9th Cir. 1992) (prosecutor should have prefaced argument with “as the evidence shows”).

¹⁰ *E.g.*, *Fletcher*, 62 M.J. at 179–80.

¹¹ *E.g.*, *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983) (“[I]t is improper for counsel to seek unduly to inflame the passions or prejudices of court members.”).

¹² *Id.* at 29–30. There is an exception to this general prohibition that permits comment on matters of common knowledge. *Fletcher*, 62 M.J. at 183.

¹³ MCM, *supra* note 2, R.C.M. 919(b) discussion. There are additional limitations on arguments by trial counsel, who may not comment on the accused’s exercise of the right against self-incrimination or the right to counsel, the failure of the defense to call witnesses, or the probable effect of findings on relations between the military and civilian communities. *Id.*

¹⁴ *See United States v. Young*, 470 U.S. 1, 8–9 (1985) (“It is clear that counsel on both sides of the table share a duty to confine arguments to the jury within proper bounds.”). The American Bar Association Standards for Criminal Justice prescribe the same standards for arguments to the jury by prosecutors and defense counsel. For prosecutors, Standard 3-5.8 provides:

(a) In closing argument to the jury, the prosecutor may argue all reasonable inferences from evidence in the record. The prosecutor should not intentionally misstate the evidence or mislead the jury as to the inferences it may draw. (b) The prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant. (c) The prosecutor should not make arguments calculated to appeal to the prejudices of the jury. (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence.

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION, Standard 3-5.8, 106 (3d ed. 1993), available at http://www.abanet.org/crimjust/standards/pfunc_blk.html#5.8. The standard for jury argument by the defense, 4-7.7, substitutes “defense counsel” for “the prosecutor,” but otherwise uses exactly the same language. *Id.* Standard 4-7.7. As Judge Learned Hand declared in *United States v. Wexler*, “Courts . . . recognize . . . that the truth is not likely to emerge, if the prosecution is confined to such detached exposition as would be appropriate in a lecture, while the defense is allowed those appeals in misericordiam which long custom has come to sanction.” 79 F.2d 526, 530 (2d Cir. 1935). There are few reported cases addressing improper defense arguments, because an acquittal is not subject to review and a conviction will not be reversed for an improper comment by defense counsel not amounting to constitutionally ineffective assistance. *See Young*, 470 U.S. at 9 n.6; *United States v. Fisher*, 17 M.J. 768, 772 (A.F.C.M.R. 1983), *rev’d on other grounds*, 24 M.J. 358 (C.M.A. 1987); Rosemary Nidiry, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299, 1315 (1996).

¹⁵ MCM, *supra* note 2, R.C.M. 1001(g).

¹⁶ *See United States v. Feger*, No. 97 00301, 1997 WL 766471, at *1 n.2 (N-M. Ct. Crim. App. Oct. 30, 1997).

¹⁷ *United States v. Wood*, 40 C.M.R. 3, 8 (C.M.A. 1969).

¹⁸ *Id.*; *see MCM*, *supra* note 2, R.C.M. 912(f)(1) discussion.

¹⁹ *See United States v. Shamberger*, 1 M.J. 377, 379 (C.M.A. 1977) (quoting the *American Bar Association’s Standards for Criminal Justice, The Prosecution Function* §§ 5.8(c), (d) (1971)); *United States v. Moore*, 6 M.J. 661, 664 (A.F.C.M.R. 1978) (asking members to picture their families as crime victims was inflammatory). Inflammatory arguments are prohibited by RCM 919(b). MCM, *supra* note 2, R.C.M. 919(b) discussion.

Examples of Golden Rule sentencing arguments concerning victims declared improper by military courts include asking the members:

- How they would feel if their father or brother had been slain as the victim was (by weapons fire in response to a false alarm);²⁰
- If they would want the accused, a scoutmaster convicted of taking indecent liberties with three boys in his Boy Scout troop, to have access to other young boys, the members' sons, or their friends' sons;²¹
- To put themselves in the position of a Soldier who was pinned to the ground and helpless as the accused and two other men took turns raping his wife;²²
- How many of them go home at night hoping that none of their subordinates or family members meet with someone like the accused who has drugs ready for sale;²³
- If the victim was their son, would they let him say he did not want to go to the doctor or force him to get medical care;²⁴ and
- To imagine being the murder victim, who was lured into the home of another Marine, beaten to unconsciousness by three Marines who used fists, shod feet, a baseball bat, and a stun gun, then bound, taken to a remote area, and executed with a single pistol shot to the head.²⁵

Asking members to put themselves in the place of the accused also improperly seeks judgment colored by personal interest.²⁶ In *United States v. Roman*, the district court granted a government motion *in limine* to preclude the defendant from making a golden rule appeal to the jury.²⁷ The defendant was a police officer charged with filing fraudulent tax returns that excluded additional money he earned working part-time providing security at a "gentlemen's club."²⁸ He wanted to ask the jury to put themselves in his shoes and think, "There but for the grace of God go I."²⁹ The court of appeals affirmed and held the argument to have been correctly foreclosed.³⁰

²⁰ *United States v. Begley*, 38 C.M.R. 488, 495 (A.B.R. 1967).

²¹ *Wood*, 40 C.M.R. at 8; *see also* *United States v. Cabrera-Frattini*, 65 M.J. 950, 955 (N-M. Ct. Crim. App. 2008) (holding trial counsel's sentencing argument in a case involving carnal knowledge and indecent acts with a child—that the members' children were not safe on base with the accused around—to be improper, but not plain error).

²² *Shamberger*, 1 M.J. at 379.

²³ *Moore*, 6 M.J. at 663–64.

²⁴ *United States v. Robertson*, 37 M.J. 432, 439 (C.M.A. 1993) (Gierke, J., concurring).

²⁵ *United States v. Baer*, 53 M.J. 235, 236–37 (2000). Unpublished military cases illustrating this type of improper argument include *United States v. Lanz*, No. 96 01460, 1998 WL 35491, at * 1 (N-M. Ct. Crim. App. Jan. 13, 1998) (finding no plain error in admittedly improper argument of trial counsel who asked members in case of indecent acts involving children: "What if these were your children?"); *United States v. Harris*, No. 94 01947, 1996 WL 927867, at *1–2 (N-M. Ct. Crim. App. Jan. 23, 1996) (sentence set aside because trial counsel asked members to put themselves in the place of sodomy and indecent assault victims); *United States v. Aiple*, No. 28642, 1990 WL 149843, at *1 (A.F.C.M.R. Sept. 7, 1990) (sentence reassessed based on sentencing argument upon conviction of a fire fighter of using drugs; assistant trial counsel asked members, "Would you want [the accused] on duty if you had to report a fire at your house?").

²⁶ *See* *United States v. Roman*, 492 F.3d 803, 805–06 (7th Cir. 2007); *United States v. Teslim*, 869 F.2d 316, 327–28 (7th Cir. 1989) (in commenting on the evidence that police officers told the defendant that he could stay with his luggage while a drug detection dog was brought to check it, the prosecutor improperly began to ask jurors, "if it happened to you and you had nothing to hide—"); *Jackson v. Roper*, No. 4:05CV1090 JCH, 2006 WL 3694635, at *3 (E.D. Mo. Dec. 14, 2006) ("At least three times, [defense] counsel improperly asked the jury to place themselves at the crime scene and consider what they would do in [defendant's] place.").

²⁷ *Roman*, 492 F.3d at 805.

²⁸ *Id.* at 803–04.

²⁹ *Id.* at 805.

³⁰ *Id.* at 806.

An appeal to the pecuniary interests of members is another inappropriate invocation of personal interest.³¹ A trial counsel could not properly argue that a larceny from the post exchange, commissary, or any military community organization or fund was a theft from the members themselves, *i.e.*, “when the accused stole that money, he stole it from you,” for that would constitute an appeal to the members’ personal financial interests.³²

This issue may arise via victim impact testimony, too. When the father of a rape victim was asked to relate his reaction when his daughter called to advise him that she had been raped, he said, “I pray right now that all of you that sit here don’t ever have to get a call like that.”³³ The court concluded the statement was a spontaneous emotional response that did not constitute an attempt by counsel to ask the court members to put themselves in the position of the victim’s father.³⁴ In contrast, the following direct appeal by the mother of another victim was considered asking the members to put themselves in the place of the parents and held impermissibly inflammatory:

I don’t know how many of you are parents. I’m sure some of you are. I hope that you put that person away for as long as possible so that you or others don’t have to live through the nightmare we have because . . . he will do it again, and I hope it’s not your family or someone you love or care about. Please, for your own families and for others.³⁵

Keeping the Trial Golden

Opposing counsel must be vigilant during closing arguments, for any objections to improper argument not made before the military judge begins to instruct the members are waived.³⁶ Without a timely objection during trial, appellate review is only for plain error—obvious error resulting “in material prejudice to a substantial right of the accused.”³⁷ In assessing prejudice, the court balances: “(1) the severity of the misconduct, (2) the measures adopted to cure the misconduct, and (3) the weight of the evidence supporting the conviction.”³⁸ A defense counsel’s failure to object to improper argument may constitute ineffective assistance.³⁹

Improper argument thus does not always constitute reversible error, but may have other consequences. An objection by opposing counsel disrupts a closing argument and, if sustained, may adversely affect how the entire argument is received by the members. If the aborted argument was a discomforting effort to get the members to put themselves in the place of the

³¹ See *United States v. Ortega*, No. 30776, 1995 WL 132055, at *1 (A.F. Ct. Crim. App. Mar. 17, 1995) (finding it improper to argue that accused, “in effect, stole from the court members when he shoplifted from the base exchange”); *United States v. Palma*, 473 F.3d 899, 902 (8th Cir. 2007) (improper to invoke jurors’ status as taxpayers in case of Social Security fraud by arguing that the defendant lied and got money from the jurors (collecting cases); see also *Judy E. Zelin*, Annotation, *Prosecutor’s Appeal in Criminal Case to Self-Interest or Prejudice of Jurors as Taxpayers as Ground for Reversal, New Trial, or Mistrial*, 60 A.L.R. 4TH 1063 (1988).

³² See *Ortega*, No. 30776, 1995 WL 132055, at *1.

³³ *United States v. Moses*, No. 32039, 1996 WL 685835, at *3 (A.F. Ct. Crim. App. Nov. 27, 1996).

³⁴ *Id.*

³⁵ *United States v. Martinez*, No. 96 01990, 1998 WL 351513, at * 1–2 (N-M. Ct. Crim. App. June 23, 1998).

³⁶ MCM, *supra* note 2, R.C.M. 919(c), R.C.M. 1001(g). Military judges likewise “should be alert to improper argument and take corrective action when necessary.” *Id.* R.C.M. 919(c) discussion. See *United States v. Erickson*, 65 M.J. 221, 223–25 (2007). In a judge alone trial, the military judge is presumed to know and follow the law distinguishing between proper and improper arguments absent clear evidence to the contrary. *Id.*

³⁷ *United States v. Fletcher*, 62 M.J. 175, 179 (2005).

³⁸ *Id.* at 184.

³⁹ See, e.g., *Girts v. Yanai*, 501 F.3d 743, 756–58 (6th Cir. 2007) (failure to object to comment on defendant’s failure to testify); *Burns v. Gammon*, 260 F.3d 892, 896–98 (8th Cir. 2001) (failure to object to argument that jury should consider defendant’s exercise of his right to trial); *Newlon v. Armentrout*, 693 F. Supp. 799, 810–11 (W.D. Mo. 1988) (failure to object to prosecutor’s argument that expressed personal belief, compared defendant to mass-murderers, and questioned whether jury would kill the defendant if he was going to harm their children), *aff’d*, 885 F.2d 1328 (8th Cir. 1989).

accused or the victim, members may ask themselves, “What was this lawyer trying to pull?” The argument may open the door to an otherwise impermissible response by opposing counsel.⁴⁰ Improper argument may also violate ethical rules.⁴¹

An improper argument is not redeemed or saved by counsel’s good intentions.⁴² As the Court of Appeals for the Armed Forces admonished in *United States v. Baer*:

What the trial counsel may or may not have calculated in making an improper argument is not as important as the actual direction, tone, theme, and presentation of the argument as it is delivered. Trial counsel must therefore actively take responsibility upon themselves to avoid all improper argument, rather than to rely on their own noble intentions as a defense against the potential consequences of such arguments. The best and safest advocacy will stay well clear of the “gray zone.”⁴³

Permissible Personalizing

Not every effort to personalize a case in closing argument has been prohibited. Courts have allowed counsel to ask jury members to put themselves in the place of a witness.⁴⁴ In *United States v. Kirvan*, the court concluded that “golden rule” cases were inapplicable to a prosecution request that the jury put itself in the place of an eyewitness and held that “the invitation [was] not an improper appeal to the jury to base its decision on sympathy for the victim but rather a means of asking the jury to reconstruct the situation in order to decide whether a witness’ testimony is plausible.”⁴⁵

Prosecutors also have been allowed to ask the jury to put themselves in the place of the victim or the defendant if the purpose is not to inflame the passions of the jury or to urge a decision based on sympathy, but is merely to facilitate the evaluation of the evidence. In *Brown v. State*, asking the jury to put themselves in the victim’s place in judging the believability of her testimony concerning the defendant’s attack was considered proper.⁴⁶ In *State v. Bell*, the prosecutor sought to discredit the defendant, who had offered an innocent explanation of his actions on the night he was accused of shooting a police officer.⁴⁷ In rebuttal argument, the prosecutor asked the jurors to put themselves in the defendant’s position that night and consider what they would have done and said if they were innocent.⁴⁸ The court held that the prosecutor was asking the jurors to draw inferences from the evidence based upon their judgment of how a reasonable person would act under the circumstances, including inferring consciousness of guilt from the defendant’s deception, and thus was within bounds.⁴⁹ In *United States v. Moreno*, asking the jurors to put themselves in the place of the defendant was deemed an

⁴⁰ *United States v. Doctor*, 21 C.M.R. 252, 260 (C.M.A. 1956) (“There are numerous authorities to the effect that a prosecutor’s reply to arguments of defense may become proper, even though, had the argument not been made, the subject of the reply would have been objectionable.”); *United States v. Haney*, 64 M.J. 101, 113–16 (2006) (Crawford, J., concurring in part); see *United States v. Robinson*, 485 U.S. 25 (1988) (defense argument that government had unfairly denied defendant the opportunity to explain his actions invited prosecution response that defendant could have taken the stand); *United States v. Young*, 470 U.S. 1, 4–14 (1985) (though invited response may not be prejudicial error, this doctrine should not encourage inappropriate responses in kind; the better remedy is for the judge “to deal with the improper argument by the defense counsel promptly and thus blunt the need for the prosecutor to respond”).

⁴¹ See AR 27-26, *supra* note 2, R. 3.4(e) (“A lawyer shall not: (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused.”); see also *Young*, 470 U.S. at 14 (closing arguments by both prosecutor and defense counsel that included personal opinions and inflammatory attacks on opposing counsel “crossed the line of permissible conduct established by the ethical rules of the legal profession”).

⁴² *United States v. Baer*, 53 M.J. 235, 239 (2000).

⁴³ *Id.*

⁴⁴ See *United States v. Kirvan*, 997 F.2d 963, 964 (1st Cir. 1993); *State v. Bell*, 931 A.2d 198, 212–15 (Conn. 2007); *Commonwealth v. Stafford*, 749 A.2d 489, 498–99 (Pa. Super. Ct. 2000).

⁴⁵ *Kirvan*, 997 F.2d at 964.

⁴⁶ 839 So.2d 597, 601 (Miss. App. 2003).

⁴⁷ *Bell*, 931 A. 2d at 212–13.

⁴⁸ *Id.*

⁴⁹ *Id.* at 214–15.

acceptable attempt to get them to focus on the evidence in deciding whether the defendant was unaware of her co-defendant boyfriend's drug trafficking, as she claimed, notwithstanding the evidence that she repeatedly "gift-wrapped" cocaine for delivery to his customers.⁵⁰ In *United States v. Abreu*, the prosecutor addressed whether a defendant made substantial income from cocaine distribution by asking jurors: "When you left your house this morning, did you leave \$23,000 on the bed? Did you leave \$2,500 in the headboard of your bed? Did you leave \$500 in the kitchen drawer? Did you leave \$26,000 in your apartment when you left this morning?"⁵¹ The court declared this argument merely a call for the jury to employ common sense in evaluating and drawing reasonable inferences from the evidence.⁵²

Personalized arguments aimed at relevant sentencing factors have also been allowed. A sentencing "argument asking the members to imagine the victim's fear, pain, terror, and anguish is permissible, since it is simply asking the members to consider victim impact evidence."⁵³ Asking the members to imagine the victim's circumstances "is conceptually different from asking them to put themselves in the victim's place."⁵⁴ Asking whether the members would want an accused found guilty of wrongful appropriation of money from a patients' trust fund to be the bookkeeper of a fund over which they were responsible – and urging a punitive discharge if the answer was "no"—was held a fair comment on the risk of recidivism in *United States v. Berry*.⁵⁵ In *United States v. Williams*, the following words were deemed an acceptable rhetorical question regarding the specific deterrence theory of sentencing and the appropriate duration of confinement for the accused: "you must determine how long it will be until you all, representing society, want this rapist walking among your daughters. . . . How many days do you want to go by before you let this man out among your daughters—our daughters."⁵⁶ Asking the jury to "imagine [being] in your own living room not bothering a soul on a Saturday afternoon . . . [when] a total stranger, because you got in his way, destroys you," was upheld, in *Kennedy v. Dugger*, as permissible comment on future dangerousness.⁵⁷

Personalizing the victim or the accused is perilous, however. Counsel not adequately mindful of the distinction between what is permitted and what is not may slide across the line in the heat of the argument.⁵⁸ That line may be hard to pinpoint. Courts consider arguments in their entirety, viewed in the context of the whole court-martial.⁵⁹ An argument deemed on the permissible side of the line in the context of one case may be declared out of bounds when the circumstances are slightly different.⁶⁰

⁵⁰ 947 F.2d 7, 8 (1st Cir. 1991).

⁵¹ 952 F.2d 1458, 1470 (1st Cir. 1992).

⁵² *Id.* at 1471 (conducting plain error review in the absence of a contemporaneous objection).

⁵³ *United States v. Baer*, 53 M.J. 235, 238 (2000); *see United States v. Edmonds*, 36 M.J. 791, 792–93 (A.C.M.R. 1993) (asking members to imagine the fear of a robbery victim is permissible); *Basile v. Bowersox*, 125 F. Supp. 2d 930, 951 (E.D. Mo. 1999) (prosecutor asking jury to imagine the terror when the victim was aware of the defendant behind her, grabbing her and then shooting her twice in the back of the head constituted reasonable inferences from the evidence, not improper personalization); *State v. Jones*, 595 S.E.2d 124, 141 (N.C. 2004) (proper to ask the jury to imagine what the victims were thinking); *see also Grossman v. McDonough*, 466 F.3d 1325, 1348 (11th Cir. 2006) (permissible for prosecutor to tell jury that victim endured terrorizing blows to the head and there was "terror and pain" in the victim's voice). *Compare Merck v. State*, 975 So. 2d 1054, 1062–65 (Fla. 2007) (finding prosecutors sentencing comment that "[o]ne has to wonder . . . how kind [the victim] felt when the Defendant jabbed this [knife] into his throat and twisted it" and question regarding how many thoughts went through jurors heads in a time equivalent to the victim's last moments constituted permissible descriptions of the victim's injuries and suffering based on facts in evidence and common sense inferences from those facts), *with Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985) ("inviting the jury to imagine the victim's final pain, terror, and defenselessness" has long been prohibited in Florida).

⁵⁴ *Baer*, 53 M.J. at 238; *accord United States v. Melbourne*, 58 M.J. 682, 690 (N-M. Ct. Crim. App. 2003); *Edmonds*, 36 M.J. at 793.

⁵⁵ 37 C.M.R. 638, 640 (A.B.R. 1967) (also finding waiver for failure to object).

⁵⁶ 23 M.J. 776, 779, 786–87 (A.C.M.R. 1987); *see also United States v. Sipp*, No. 94 01475, 1995 WL 934969, at *1 (N-M. Ct. Crim. App. Sept. 15, 1995).

⁵⁷ 933 F.2d 905, 913 (11th Cir. 1991).

⁵⁸ *Baer*, 53 M.J. at 238.

⁵⁹ *Id.*; *see United States v. Robinson*, 485 U.S. 25, 33 (1988) (holding that "prosecutorial comment must be examined in context").

⁶⁰ The difficulty in predicting whether a particular argument will be deemed an improper request for the members to put themselves in the place of the victim is illustrated by comparing the argument held impermissible in *Baer*, 53 M.J. at 237–38, with the argument allowed in *Dugger*, 933 F.2d at 913.

The Orator Is Well Prepared

A closing argument is as good as the evidence and preparation on which it is based, for which theatrics are no substitute.⁶¹ The cornerstones of effective trial preparation include a thorough investigation of the facts, comprehension of the elements of the offense, analysis of how each element can be proven by admissible evidence, and consideration of how the case will be presented to the fact-finder in closing argument.⁶² In crafting a case presentation, counsel must consider how the members or the judge will view the accused and any victim of the charged crime. Trial counsel may want the members to identify with a victim, a witness, or the command, while defense counsel seeks an understanding of the accused's perspective that will yield a not guilty verdict or minimize the sentence. The prohibition of Golden Rule arguments should pose little problem in this quest for empathy. Counsel remain free "to comment earnestly and forcefully on the evidence" and reasonable inferences that may be drawn from it,⁶³ using "blunt and emphatic language."⁶⁴ Arguments that evoke strong emotions or tend to be inflammatory may be appropriate if grounded in evidence in the record and legitimate merits or sentencing concerns.⁶⁵

The difference between what is permitted and what is not is more than pedantic. The lawyer's tools are words carefully chosen based on knowledge of the facts and applicable law. Ignorance of the rules or clumsy word choices may result in an improper argument, but a little thought and recasting can convert an idea for an impermissible argument into an effective one. Would a description of the circumstances of the gang rape charged in *United States v. Shamberger*,⁶⁶ including the proximity and restraint of the victim's husband, be less powerful without asking the members to put themselves in the husband's position? Not in the hands of an effective advocate who told the story with every detail found in, or reasonably inferred from, the evidence.

Conclusion

You can move the members to walk a mile in the shoes⁶⁷ of the accused or feel the pain of a crime victim without an express invitation (that might derail your effort, immediately or on appeal), by focusing on the details from the outset, gathering and presenting the evidence upon which your arguments will be based, and then telling the members what the evidence shows in vivid language appropriate to the circumstances. The Golden Rule for advocates is: prepare—and treat others the way you want to be treated.

⁶¹ See Joseph F. Anderson, Jr., *The Lost Art: An Advocate's Guide to Effective Closing Argument*, 48 U.S. ATTY'S BULL. 3, 19 (Sept. 2006).

⁶² "Whether prosecutor or defender, the advocate should be thinking about the closing argument from the time that involvement in the case begins." *Planning Closing Argument*, 2 CRIM. PRAC. MANUAL § 57:2 (West 2007).

⁶³ *United States v. Doctor*, 21 C.M.R. 252, 259 (C.M.A. 1956).

⁶⁴ *United States v. Edmonds*, 36 M.J. 791, 792 (A.C.M.R. 1993); *United States v. Williams*, 23 M.J. 776, 779 (A.C.M.R. 1987).

⁶⁵ See *Doctor*, 21 C.M.R. at 259; *Edmonds*, 36 M.J. at 792; *Williams*, 23 M.J. at 779.

⁶⁶ 1 M.J. 377, 379 (C.M.A. 1976).

⁶⁷ JOE SOUTH, *Walk a Mile in My Shoes*, on THE GAMES PEOPLE PLAY (Lowery Music Co. 1969).